Lim Yoke Kong v Sivapiran a/l Sabapathy

SUPREME COURT (KUALA LUMPUR) — CIVIL APPEAL NO 02-537 OF 1990
HARUN HASHIM, MOHAMED AZMI AND PEH SWEE CHIN SCJJ
28 AUGUST 1992

Damages (Personal Injury or Death) *— Limitation — Postponement of limitation period — Fraudulent concealment — Identity of insurer not ascertained until after expiry of limitation period — Insurer withheld itself from identification — Whether insurer guilty of unconscionable conduct amounting to fraud — Whether limitation period could be postponed — Distinction between 'cause of action' and 'right of action' — Limitation Act 1953 s 29(a) & (b) — Road Traffic Ordinance 1958 s 80*

Limitation *— Postponement of limitation period — Fraudulent concealment — Claim for damages for personal injury in road accident — Identity of insurer not ascertained until after expiry of limitation period — Insurer withheld itself from identification — Whether insurer guilty of unconscionable conduct amounting to fraud — Whether limitation period could be postponed — Distinction between 'cause of action' and 'right of action' — Limitation Act 1953 s 29(a) & (b) — Road Traffic Ordinance 1958 s 80*

The respondent was walking along the edge of a road when he was negligently knocked down by the appellant who was riding a motor cycle. The solicitors for the respondent attempted to trace the insurer of the motor cycle but were unable to do so until after the expiry of the limitation period. At the trial before the magistrate, liability was admitted by the appellant and the quantum of damages had also been agreed. The only issue was whether the claim was time-barred under s 6(1)(a) of the Limitation Act 1953 ('the Act'). The magistrate held that the claim was time-barred as he did not find the appellant or the insurer guilty of any fraud to warrant the intervention of s 29(b) of the Act. On appeal, the learned judge of the High Court held, on the basis of s 29(b) of the Act, that the period of limitation should be postponed due to the fraud of the insurer in withholding itself from being identified and thereby concealing the right of action from the respondent (see [1992] 2 MLJ 381). The appellant appealed.

Held, dismissing the appeal:

(1) The learned judge was correct in law in coming to the conclusion that by intentionally refusing to come forward in response to the Motor Insurers' Bureau circular letter, the reasonable conclusion to be drawn from such conduct was that the respondent's right of action had been concealed by the fraud of the insurance company and as such the six-year limitation period which expired on 31 March 1983 should be postponed until the respondent had discovered the fraud or could with reasonable diligence have discovered it.

(2) The respondent's 'cause of action' against the appellant is based on negligence, and his 'right of action' is in damages against the

insurance company by virtue of s 80 of the Road Traffic Ordinance 1958 ('the Ordinance'). By employing different terms in s 29(b) and in s 29(a) and (c) of the Act, the legislature clearly intends to make a distinction between the terms 'cause of action' and 'right of action' in that postponement of limitation period is allowed under para (a) where the cause of action is based on fraud and whereas under para (b) it is allowed in all cases where the remedy or right of action is concealed by fraud.

(3) In the circumstances of this case, the insurance company was clearly guilty of unconscionable conduct amounting to fraud within the meaning of s 29(b) of the Act in concealing from the respondent his right of action during the limitation period and thereby entitling the respondent to a postponement of the limitation period to 28 March 1984, when for the first time he came to know of the identity of the insurance company, after all reasonable attempts had been made to trace and identify the insurance company for the purpose of serving the statutory notice under s 80(2)(a) of the Ordinance. The fraud of the insurance company could not have been discovered with reasonable diligence before its discovery on 28 March 1984.

[Bahasa Malaysia summary

Penentang sedang berjalan di tepi suatu jalan apabila dia telah dilanggar oleh perayu kerana kecuaian perayu penunggang motorsikal. Peguam bagi pihak penentang telah cuba mengesan syarikat insurans motorsikal itu tetapi mereka tidak berjaya membuat demikian, sehingga selepas tamatnya tempoh had masa. Di perbicaraan di hadapan majistret liabiliti telah diakui oleh perayu dan kuantum ganti rugi juga telah dipersetujui. Isu tunggal adalah sama ada tuntutan itu dihalang had masa di bawah s 6(1)(a) Akta Had Masa 1953 ('Akta itu'). Majistret itu memutuskan bahawa tuntutan itu dihalang had masa oleh kerana beliau tidak berpendapat perayu atau syarikat insurans itu bersalah kerana sebarang fraud supaya mewajarkan penggunaan s 29(b) Akta itu. Atas rayuan, hakim Mahkamah Tinggi yang arif memutuskan berasaskan s 29(b) Akta itu bahawa tempoh had masa hendaklah ditangguhkan kerana fraud syarikat insurans itu dengan menyembunyikan dirinya daripada dikenal pasti dan oleh kerana itu menyembunyikan hak membawa tindakan daripada penentang. Perayu telah membuat rayuan.

Diputuskan, menolak rayuan itu:

(1) Hakim yang arif adalah betul di sisi undang-undang dalam membuat kesimpulan bahawa dengan sengaja enggan menampil ke hadapan memberi jawapan kepada surat pekeliling Biro Syarikat Insuran Motor, kesimpulan yang munasabah yang boleh dibuat daripada kelakuan seperti itu ialah bahawa hak membawa tindakan penentang tersembunyi oleh fraud syarikat insurans itu dan oleh

kerana itu tempoh had masa enam tahun yang tamat pada 31 Mac 1983 hendaklah ditangguhkan sehingga penentang mendapat tahu tentang fraud itu atau boleh dengan ketekunan yang munasabah mendapat tahu tentangnya.

(2) 'Kausa tindakan' penentang terhadap perayu adalah berdasarkan kecuaian, dan 'hak membawa tindakan' beliau adalah dalam ganti rugi terhadap syarikat insurans mengikut s 80 Ordinan Lalu Lintas Jalan 1958 ('Ordinan itu'). Dengan menggunakan terma yang berlainan dalam s 29(b) dan dalam s 29(a) dan (c) Akta itu, badan perundangan dengan jelas bermaksud untuk membuat suatu perbezaan antara terma-terma 'kausa tindakan' dan 'hak membawa tindakan', yakni penangguhan had masa dibenarkan di bawah para (a) di mana kausa tindakan berdasarkan fraud sedangkan di bawah para (b) ia dibenarkan dalam semua kes di mana remedi atau hak membawa tindakan tersembunyi oleh fraud.

(3) Dalam keadaan kes ini, syarikat insurans jelas bersalah kerana kelakuan yang tidak berpatutan menunjukkan fraud dalam makna s 29(b) Akta itu dalam menyembunyikan daripada penentang hak membawa tindakan beliau semasa tempoh had masa itu dan oleh kerana itu memberikan kepada penentang hak menangguhkan tempoh had masa itu kepada 28 Mac 1984, apabila pada kali pertama beliau mendapat tahu tentang identiti syarikat insurans itu, selepas semua percubaan yang munasabah telah dibuat untuk mengesan dan mengenal pasti syarikat insurans itu untuk tujuan menyampaikan notis statutori di bawah s 80(2)(a) Ordinan itu. Fraud syarikat insurans itu tidak boleh didapat tahu dengan ketekunan munasabah sebelum mendapat tahu tentangnya pada 28 Mac 1984.

Cases referred to

1 *RB Policies at Lloyd's v Butler* [1950] 1 KB 76 (refd)
2 *Kitchen v Royal Air Forces Association & Ors* [1958] 2 All ER 241 (folld)
3 *Hock Hua Bank Bhd v Leong Yew Chin* [1987] 1 MLJ 230 (distd)
4 *New Zealand Insurance Co Ltd v Ong Choon Lin (t/a Syarikat Federal Motor Trading)* [1992] 1 MLJ 185 (distd)
5 *Baroda Spinning & Weaving Co Ltd v Satyanarayan Marine & Fire Insurance Co Ltd* AIR 1914 Bom 225 (not folld)
6 *Credit Corporation (M) Bhd v Fong Tak Sin* [1991] 1 MLJ 409 (distd)
7 *Johannes Koplan v Aw Chen* [1970] 1 MLJ 220 (folld)

Legislation referred to

Limitation Act 1953 ss 6(1), 29
Road Traffic Ordinance 1958 s 80(1), (2)(a)

Appeal from: Civil Suit No R8–11–97–89 (High Court, Kuala Lumpur)

DC Alfred (*Sangara & DC Alfred*) for the appellant. A

RK Nathan (*Victoria Martin* with him) (*RK Nathan & Co*) for the respondent.

Mohamed Azmi SCJ (delivering the grounds of judgment of the court): This appeal demonstrates the legal and practical difficulties that may be encountered by a victim of a road accident where even with reasonable diligence he could not during the period of limitation ascertain the identity of the insurance company which insures the driver of the vehicle involved under third party policy for the purpose of complying with the seven-day notice, required to be served on the insurer under s 80(2)(a) of the Road Traffic Ordinance 1958 (now s 96 of the Road Transport Act 1987) for the purpose of enforcing any judgment obtained against the negligent driver. B C

Section 80(1) and (2)(a) of the Road Traffic Ordinance 1958 ('the RTO') states:

> (1) If, after a certificate of insurance has been delivered under subsection (4) of section 75 of this Ordinance to the person by whom a policy has been effected, judgment in respect of any such liability as is required to be covered by a policy under paragraph (b) of subsection (1) of section 75 of this Ordinance (being a liability covered by the terms of the policy) is given against any person insured by the policy, then notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled, the policy the insurer shall, subject to the provisions of this section, pay to the persons entitled to the benefit of the judgment any sum payable thereunder in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any written law relating to interest on judgments. D E
>
> (2) No sum shall be payable by an insurer under the foregoing provisions of this section — F
>
> (a) in respect of any judgment, unless before or within seven days after the commencement of the proceedings in which the judgment was given the insurer had notice of the proceedings.

It seems to be suggested by Mr DC Alfred, counsel for the appellant motor cyclist, that even if it is obvious that the tortfeasor is a man of straw, or is unwilling or unable to furnish the identity of the insurer of his vehicle, the injured plaintiff though unable to give the necessary notice under s 80(2)(a) of the RTO to make the insurer liable for payment, should nevertheless commence proceedings within the limitation period, or face the consequences of having his action statute-barred. To support such a legal proposition, it is necessary to consider relevant provisions of the Limitation Act 1953 ('the Act'), in particular s 6(1)(c) and s 29(b) read in conjunction with s 80(1)(b) of the RTO. G H

In this appeal, the facts of the case are by and large not in dispute. The plaintiff was lawfully walking along the edge of Jalan Ampang, Kuala Lumpur on 1 April 1977 when he was negligently knocked down by a motor cyclist (the appellant before us) who was riding a motor cycle bearing registration number AF 3571. Under s 6(1)(a) of the Act, any action against the motor cyclist based on his negligence would become statute- I

barred on 31 March 1983. Although the plaintiff had given instruction to his present solicitors in early 1982, no writ was filed until 22 May 1986, ie not until East West Insurance Bhd was traced and positively identified as the insurer of the motor cycle at the relevant time of the accident, and was accordingly notified two days earlier on 20 May 1986 for the purpose of s 80(2)(a) of the RTO.

Before the magistrate, liability was admitted by the motor cyclist, and quantum of damages had also been agreed. The only issue in the magistrate's court was whether the plaintiff's claim filed on 22 May 1986 was time-barred under s 6(1)(a). The magistrate held that the claim was time-barred as he did not find the motor cyclist or the insurer guilty of any fraud to warrant the intervention of s 29(b). On appeal, Eusoff Chin J (as he then was) disagreed [see [1992] 2 MLJ 381]. In allowing the plaintiff's appeal, the learned judge held that on the basis of s 29(b) of the Act the period of limitation should be postponed due to the fraud of East West Insurance Bhd in withholding itself from being identified, and thereby concealing the right of action from the plaintiff.

In his grounds of judgment the magistrate held that the identity of the motor cyclist was known to the plaintiff when the plaintiff's solicitors wrote to the motor cyclist on 15 June 1982 which was still within the limitation period, but the plaintiff did not file a claim until 22 May 1986, outside the limitation period. The magistrate further held that there was no necessity on the part of the plaintiff to have delayed the filing of the action notwithstanding that the identity of the insurer could not be determined. It was his opinion that since the identity of the motor cyclist was known, any further particulars could always be pleaded by way of amendment. He finally quoted the following statement of Streatfield J in *RB Policies at Lloyd's v Butler*[1] at p 81 on the consequences of lateness and dilatory conduct on the part of a plaintiff in filing his claim:

> I agree with Mr Atkinson that it is a policy of the Limitation Acts that those who go to sleep upon their claims should not be assisted by the courts in recovering their property, but another, and, I think, equal policy behind these Acts, is that there shall be an end of litigation, and that protection shall be afforded against stale demands.

It is clear from the magistrate's grounds of judgment that he came to the conclusion that s 29(b) did not apply in this case because firstly, the identity of the motor cyclist was known to the plaintiff in June 1982, well before the expiry of the date of limitation, and secondly, on the evidence, neither the motor cyclist nor East West Insurance Bhd was guilty of fraud without which s 29(b) could not apply.

Now, s 6(1)(a) and s 29 of the Act provide:

> 6(1) Save as hereinafter provided the following actions shall not be brought after the expiration of six years from the date on which *the cause of action* accrued, that is to say —
>
> (a) *actions* founded on a contract or on tort;
> (b) *actions* to enforce a recognisance;
> (c) *actions* to enforce an award;

(d) *actions* to recover any sum recoverable by virtue of any written law other than a penalty or forfeiture or of a sum by way of penalty or forfeiture. A

29 Where, in the case of any action for which a period of limitation is prescribed by this Act, either —

(a) *the action* is based upon the fraud of the defendant or his agent or of any person through whom he claims or his agent; or B
(b) *the right of action* is concealed by the fraud of any such person as aforesaid; or
(c) *the action* is for relief from the consequences of a mistake,

the period of limitation shall not begin to run until the plaintiff has discovered the fraud or the mistake, as the case may be, or could with reasonable diligence have discovered it. (Emphasis supplied.) C

In finding that 'the right of action is concealed by the fraud' of the motor cyclist or his insurer (East West Insurance Bhd) as 'his agent or any person through whom he claims ...' within the meaning of s 29(b), the learned judge agreed with the plaintiff's counsel's submission that there was fraud on the part of East West Insurance Bhd in concealing the fact that it was the insurer of the motor cycle ridden by the motor cyclist at the time of the accident. In reversing the magistrate's decision, he based his findings on the following facts as disclosed by the documentary evidence: D

E

On 18 August 1982, the MIB (Motor Insurers' Bureau of West Malaysia) informed the solicitors that they had sent a circular to all insurance companies to ascertain the insurers of motor cycle AF 3571 as on 1 April 1977. The circular was sent out on 16 August 1982 asking the insurance company involved to respond not later than 3 September 1982.

Since there was no response from the insurance company insuring the motor cycle AF 3571, the MIB appointed M/s Global Insurance to investigate the matter, which in turn assigned M/s Giam Adjusters to take over the investigations. F

On 31 March 1983 the MIB was still unable to ascertain which insurance company was the insurer of motor cycle AF 3571 at the date of the accident. The limitation period of six years under s 6 of the Limitation Act 1953 expired.

On 17 March 1984 M/s Global Insurance wrote to MIB, with a copy to the solicitors of the plaintiff, to say that motor cycle AF 3571 was insured with M/s East West Insurance Bhd (the insurance company), vide cover note No 5182091. The MIB vide their letter dated 28 March 1984 to the plaintiff's solicitors confirmed this fact. G

The plaintiff's solicitors on 11 April 1984, wrote to the East West Insurance Bhd asking the insurance company to confirm if they were the insurers for motor cycle AF 3571. After sending reminders, the insurance company, on 13 June 1984 replied that they would seek their solicitors' opinion, but they did not confirm that they were the insurers for the motor cycle AF 3571. H

It was only on 20 October 1984 that the insurer's solicitors wrote to the plaintiff's solicitors to the effect that the matter was time-barred. There was still no admission that the insurance company was the insurer of motor cycle AF 3571. I

After a series of correspondence between solicitors for the plaintiff and the insurance company, on 23 July 1985, the solicitors for the insurance company

finally said that the insurance company had refused to take over the conduct of the defence as the claim was time-barred.

Thus, both before and after the expiry of the limitation period on 31 March 1983, the plaintiff was faced with extraordinary difficulties in identifying East West Insurance Bhd as the relevant insurer of the motor cycle involved in the accident despite professional assistance from MIB and the insurance investigators. Even after its discovery in March 1984, the company refused to confirm its position as insurer of the vehicle; not until July 1985. What is the cause of this long delay in identifying the insurer? Was it due to inaction or dilatory conduct on the part of the plaintiff, or was it due to fraud on the part of East West Insurance Bhd in concealing and withholding its identity for the purpose of avoiding liability under s 80(2)(a) of the RTO?

In dealing with the meaning of the word 'fraud' in s 29(b) of the Act, the learned judge referred to English decisions for the simple reason that s 26 of the UK Limitation Act 1939 is in pari materia with our s 29. In *Kitchen v Royal Air Forces Association & Ors*,[2] the learned judge quoted the following passage from the judgment of Lord Evershed MR:

> It is now clear, however, that the word 'fraud' in s 26(b) of the Limitation Act 1939, is by no means limited to common law fraud or deceit. Equally, it is clear, having regard to the decision in *Beaman v ARTS Ltd* [1949] 1 All ER 465, that no degree of moral turpitude is necessary to establish fraud within the section. What is covered by equitable fraud is a matter which Lord Hardwicke did not attempt to define two hundred years ago, and I certainly shall not attempt to do so now, but it is, I think, clear that the phrase covers conduct which, having regard to some special relationship between the two parties concerned, is an unconscionable thing for the one to do towards the other.

With respect, we agree and adopt the opinion of Lord Evershed MR and, having regard to the proviso to s 80 of the RTO, in particular s 80(2)(a), there is clearly a special relationship created by law between the plaintiff here, the motor cyclist, and East West Insurance Bhd as the insurer whose third party policy covered the motor cyclist. Section 80(2)(a) imposes a statutory liability on the insurance company to satisfy any judgment obtained by the plaintiff against the motor cyclist. The insurance company knew or ought to know that for it to be made liable, it is imperative that the company should be notified by the plaintiff of any court proceedings against the motor cyclist before or within seven days after the filing of the action. It is therefore unconscionable for East West Insurance Bhd, having knowledge of the special relationship, to conceal itself by failing to respond within reasonable time to the MIB circular letter dated 16 August 1982 (see p 63 of appeal record). After writing to the motor cyclist on 15 June 1982 and failing to get any response from him, the plaintiff's solicitors took steps to engage the services of MIB to trace the relevant insurer. The MIB, a professional body, issued the circular letter to all insurance companies in West Malaysia, well before the expiry of the limitation period on 31 March 1983.

In our view the judge was correct in law in coming to the conclusion that by intentionally refusing to come forward in response to the MIB circular

letter, the reasonable conclusion to be drawn from such conduct was that the plaintiff's right of action had been concealed by the fraud of the insurance company and as such the six-year limitation period which expired on 31 March 1983 should be postponed until the plaintiff had discovered the fraud or could with reasonable diligence have discovered it. Accordingly the learned judge was justified in reversing the finding of the magistrate on the issue of fraud, by holding that the period of limitation was postponed to 28 March 1984 when the plaintiff for the first time discovered the identity of East West Insurance Bhd and realized that the insurance company had been hiding itself from discovery for the purpose of avoiding service under s 80(2)(a) and had thereby concealed from the plaintiff his right of action. By limiting the meaning of 'fraud' under s 29(b) to common law fraud or deceit, the magistrate would appear to have fallen into serious error in his conclusion.

Before us, counsel for the appellant motor cyclist did not dispute the fact that the insurance company did not respond to the MIB circular letter dated 16 August 1982 until 28 March 1984, but he gave an excuse for the delay on the ground that the insurance company was short of staff and the policy on the motor cycle AF 3571 had expired on 15 November 1983 and therefore it was difficult to trace the policy. In our view that is no excuse for the unconscionable conduct. It is obviously for the insurance company itself to organize its insurance business in such a way as to be able to discharge its statutory and contractual obligations. One of its statutory obligations is imposed by s 80 of the RTO which renders it liable under third party policy to satisfy any judgment obtained by the victim of a road accident against a negligent driver covered by its policy. In our view, there was sufficient evidence before the court to conclude that the insurance company was guilty of fraud within the meaning of s 29(b). We are not persuaded that the trial judge's finding could be displaced merely by putting the blame on the insurer's own administrative deficiency in tracing old records. In any event, the MIB circular letter to all insurance companies dated 16 August 1982 contained clear and sufficient particulars to enable any insurance company to determine whether its policy covered the motor cycle AF 3571 in April 1977, even if the policy had now expired. On balance, it is our view that it should take only a few weeks for an insurance company to trace such basic particulars, having regard to its liability under the RTO. As it stood, the MIB had to appoint Messrs Global Insurance and Messrs Giam Adjusters, to carry out investigations before the insurer could be traced. The extraordinary difficulty in discovering the insurance company within time is matched only by its unwillingness to come forward till after the limitation period.

Another argument put forward before us, was that the proper way was for the plaintiff to give the requisite notice under s 80(2)(a) by newspaper advertisement. However, we fail to appreciate in what way such a course is more superior and desirable than resorting to assistance from MIB who is more conversant and knowledgeable with the working of insurance companies. We are inclined to think (without finally deciding on the matter) that the notice required by s 80(2)(a) is actual notice and not notice by substi-

tuted service, for such a service by newspaper advertisement would be useless unless the relevant insurance company has been identified by name for the purpose of execution of the judgment obtained against the tortfeasor.

The next issue to be considered is the distinction between 'cause of action' and 'right of action' within the context of s 29(b) of the Act. The learned judge has obviously disagreed with the conclusion of the magistrate that the inability of the plaintiff to identify the insurer was no excuse for not filing the claim against the motor cyclist within time. His Lordship held [at p 391] that although the road accident which gave rise to the cause of action on negligence occurred on 1 April 1977, the right of action to damages had been concealed by the fraud of East West Insurance Bhd. The learned judge concluded [at p 391] thus:

> I find that the plaintiff could only enforce his right of action against the defendant on 28 March 1984 when the plaintiff was first told by the MIB the name of the insurance company which had insured the defendant's motor cycle. I have stressed earlier, that by virtue of s 80 of the Road Traffic Ordinance, it would be an exercise in futility for the plaintiff to proceed against the defendant unless he has first given notice to the insurance company under this section. I therefore hold that the period of limitation did not begin to run against the plaintiff until 28 March 1984 when the plaintiff first had knowledge of the name of the insurance company.

It is the contention of counsel for the appellant that the Supreme Court had ruled that there was no distinction between 'cause of action' and 'right of action'. Counsel cited, firstly, the case of *Hock Hua Bank Bhd v Leong Yew Chin*[3] where Abdul Hamid Omar Ag LP (as he then was) had this to say when dismissing by majority an appeal against the decision of the High Court which had allowed the plaintiff's application under O 20 r 5 of the Rules of the High Court 1980 to amend the pleading after expiry of the period of limitation:

> The rule is silent: indeed, it does not make the granting of leave to amend under r 5 conditional upon there being no new or substantially new relief arising out of the new cause of action. To construe otherwise would, in my view, be reading into r 5 something which is not provided for. I am firmly of the view that a new relief is not a relevant consideration. In this regard it may be pertinent to refer to the definition of the words 'cause of action' expressed by Lord Justice Diplock in *Letang v Cooper* [1965] 1 QB 232 as a 'factual situation the existence of which entitled one person to obtain from the court a remedy against another'. The definition in my view fortifies the point I am making in that a relief or a remedy is ancillary to and not separable from a cause of action. The word 'relief' in para (5) of r 5 is clearly intended to refer or apply to the original cause of action. It is merely a description with reference only to the original cause of action and should not be construed with reference to the new relief. It is clear beyond argument that it should not have the effect of restricting the court's power to grant leave to amend in cases where para (5) of r 5 is applicable.

The other authority cited was *New Zealand Insurance Co Ltd v Ong Choon Lin (t/a Syarikat Federal Motor Trading)*.[4] In delivering the judgment of this court, LC Vohrah J stated at p 195, after quoting with approval the passage cited earlier from *Hock Hua Bank*'s case:[3]

It is clear therefore that the legal distinction that obtains in the relevant Indian decisions that have been referred to between a right and its remedy in the context of the consequences that flow therefrom does not exist in Malaysian law in the eyes of which the distinction is merely semantic. We do not think that a right can be dissociated from its remedy. A

We are of the view that both authorities do not deal with the meaning of the words 'right of action' in s 29(b) as distinguished from the term 'action' or 'cause of action' in s 6(1)(a) and s 29(a) and (c) of the Act, with which we are here concerned. It is clear here that the respondent's 'cause of action' against the appellant is based on negligence, and his 'right of action' is in damages against the insurance company by virtue of s 80 of the RTO. As also stated earlier, the limitation period under s 6(1) is six years from the date of the cause of action (1 April 1977), but by virtue of s 29(b) the period is postponed if the right of action in damages can be shown to have been concealed by the fraud of the tortfeasor or the insurance company. In our view, by employing different terms in s 29(b), and in s 29(a) and (c), the legislature clearly intends to make a distinction between the terms 'cause of action' and the 'right of action'. In our opinion, *Hock Hua Bank*[3] merely ruled that for the purpose of O 20 r 5 of the RHC, an application to amend pleadings cannot be defeated by showing that by such additional cause of action a new relief is sought outside the limitation period, subject to the important proviso that the additional cause of action arose out of the same or substantially the same facts as the original cause of action in respect of which relief had already been claimed. The basic principle behind O 20 r 5 is 'whether the changes alleged in the amendment sought to be made are the same or substantially the same as those alleged to support a cause of action already pleaded'. Subject to this very important proviso, the fact that a new relief arises out of the amendment is not necessarily fatal. Thus, this is a far cry from saying that the Supreme Court has ruled that there is no distinction between 'cause of action' and 'right of action' in all cases. B C D E F

Similarly, the statement of LC Vohrah J in *New Zealand Insurance Co*'s case[4] relied upon by counsel for the appellant is taken from that part of the judgment where his Lordship was dealing with the validity of a restrictive cl 19 of a fire insurance policy which had imposed a limitation of twelve months from the happening of the loss or damage within which the insurance company could be made liable. In upholding the trial judge's decision, this court agreed that the condition imposed that the action be commenced within a twelve-month period from the occurrence of the loss or damage was void by virtue of the imperative words of s 29 of the Contracts Act 1950 as it clearly limited the time within which the respondent could enforce his right under s 6(1)(a) of the Act. His Lordship rejected the argument that there was a distinction between a void restrictive condition of limiting the time within which a party to a contract had to enforce his right, and a permissible condition of limiting the time within which he was to have any right — a distinction apparently accepted by many Indian judges, including Butler J in *Baroda Spinning & Weaving Co Ltd v Satyanarayan Marine & Fire Insurance Co Ltd.*[5] Thus, at p 194 of his judgment, LC Vohrah J concluded: G H I

A This distinction between the existence of a right and its enforcement as a matter of law does not however appear to exist in our jurisprudence as can be seen in the judgment of this court in *Hock Hua Bank Bhd v Leong Yew Chin* [1987] 1 MLJ 230.

We are of the opinion that by thus rejecting the existence of a distinction B between a right and its enforcement, it cannot be extended to mean that the Supreme Court has also considered and rejected the important distinction between 'right of action' and 'cause of action' in paras (a) and (b) of s 29 of the Act.

In our view, both the authorities cited do not assist the appellant in the argument that the legislature does not intend to make a distinction between C the terms 'cause of action' and 'right of action' in the two provisions read with s 6(1)(a). As alluded to earlier, Parliament has expressly enacted the term 'right of action' in s 29(b) as distinguished from 'action' or 'cause of action' in paras (a) and (c) of that section. Applying the rule of construction on the ordinary meaning of the words used in statutes and the fact that the D legislature has employed different terms for different paragraphs in s 29, we are of the view that Parliament must have intended to make a distinction between the different terms employed, in that postponement of limitation period is allowed under (a) where the action, ie 'cause of action' is based on fraud, and whereas under para (b) it is allowed in all cases where the remedy or right of action is concealed by fraud. The respondent's cause of E action in this case is based on negligence and not fraud, and as such, s 29(a) does not apply. On the contrary, it is the case of the respondent that his remedy in damages by virtue of s 80 of the RTO was concealed by the fraud of the defendant or the insurance company, and therefore falls under s 29(b).

F In this connection, we have also considered the judgment of this court in *Credit Corporation (M) Bhd v Fong Tak Sin*[6] and found that it did not take the appellant's argument any further, as the court there was dealing with a case under s 29(c) which was entirely different from s 29(b) of the Act.

We agree with Mr RK Nathan, counsel for the respondent, on the application of the principle of ubi jus, ibi remedium, ie where there is a G right of action there is a remedy. The principle was in fact upheld in *New Zealand Insurance*'s case,[4] where it was held at p 195 that there was no legal distinction 'between a right and its remedy'.

In considering this appeal, we are guided by the principle laid down in *Johannes Koplan v Aw Chen*,[7] where Ong CJ, in delivering the judgment of H the Federal Court, had this to say at p 221:

> In making the suggestion that we did, we might mention that we had in mind practical considerations. Legal technicalities which stand in the way of any aggrieved person seeking and obtaining his remedy in court should not be allowed to prevail so as to frustrate any just claim. Compulsory insurance against third party risks has made alterations in the common law whereby insurers are I made directly liable to satisfy judgments against their insured. The negligent driver is only the nominal defendant, whereas the party injuriously affected by an award of damages is the insurer by and in whose interests the action should be defended. If insurers 'have to fight the action without their most essential

witness, that would be their misfortune, and not the plaintiff's fault': so said Sir Wilfred Greene MR in *Murfin v Ashbridge* [1941] 1 All ER 231 at p 232. A

In this appeal, we are not persuaded that the learned judge had erred in law or in fact in concluding that East West Insurance Bhd had deliberately withheld knowledge of itself from the plaintiff by not responding to the MIB circular, although it had received the circular more than four months before the expiry of the limitation period. The explanation given for the unreasonable long delay is unsustainable. In the circumstances of this case, the insurance company was clearly guilty of unconscionable conduct amounting to fraud within the meaning of s 29(b) of the Act in concealing from the plaintiff his right of action during the period of limitation, and thereby entitling the plaintiff to a postponement of the limitation period from 1 April 1977 to 28 March 1984, when for the first time he came to know of the identity of the insurance company, after all reasonable attempts had been made to trace and identify the insurance company for the purpose of serving the statutory notice under s 80(2)(a) of the RTO. In our view the fraud of the insurance company could not have been discovered with reasonable diligence before its discovery on 28 March 1984. The fraud based on unconscionable conduct by means of delaying tactics is supported by the evidence, both before and after expiry of the limitation period. In our view the learned judge was correct in holding that during the six-year limitation period, the plaintiff had taken all reasonable steps without success to trace the insurer not only from the appellant motor cyclist but also from the police, the RIMV and finally he had to resort to professional assistance from the MIB. It is therefore difficult not to agree with the finding of the learned judge that the conduct of the insurer did amount to fraud under s 29(b). In our opinion, the intervention of s 29(b) entitles the plaintiff to postpone the filing of the writ against the appellant. B C D E F

The two reasons given by the magistrate for holding that s 29(b) did not apply were therefore wrong in law. The magistrate had failed to consider sufficiently the object and effect of s 29(b) and erred in law in holding that the respondent's claim was statute-barred. The learned judge was correct in fact and in law in reversing the magistrate's decision. Judgment should therefore be entered for the plaintiff on the quantum of damages already agreed by the parties. The appeal was accordingly dismissed with costs. G

Appeal dismissed.

Reported by Prof Ahmad Ibrahim

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